UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

MAINE CARE SERVICES, INC.,	)	
	)	
Plaintiff	)	
	)	
v.	)	*Civil No. 00-358-P-H*
	)	
	)	
UNITED STATES DEPARTMENT OF AGRICULTURE,	)	
	)	
	)	
Defendant	)	
	)	

MEMORANDUM DECISION ON MOTIONS TO STRIKE AND RECOMMENDED DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Maine Care Services, Inc. ("MCS") and the United States Department of Agriculture ("USDA") cross-move for summary judgment in this action challenging a USDA hearing-officer decision adverse to MCS. Plaintiff's Motion for Summary Judgment ("Plaintiff's Motion") (Docket No. 13); Defendant's Motion for Summary Judgment, etc. ("Defendant's Motion") (Docket No. 17). Incident thereto, USDA moves to strike two affidavits tendered by MCS. *See* Defendant's Response to Plaintiff's Statement of Material Facts ("Defendant's Opposing SMF") (Docket No. 19) at 1-2; Defendant's Reply Statement of Material Facts ("Defendant's Reply SMF") (Docket No. 27) ¶ 43. For the reasons that follow, I grant in part and deny in part USDA's motions to strike and recommend that the court grant in part and deny in part both USDA's and MCS's motions for summary judgment.

I. Summary Judgment Standards

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant . . . . By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable [factfinder] could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted).

The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). To the extent that parties cross-move for summary judgment, the court must draw all reasonable inferences against granting summary judgment to determine whether there are genuine issues of material fact to be tried. *Continental Grain Co. v. Puerto Rico Maritime Shipping Auth.*, 972 F.2d 426, 429 (1st Cir. 1992). If there are any genuine issues of material fact, both motions must be denied as to the affected issue or issues of law; if not, one party is entitled to judgment as a matter of law. 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2720, at 336-37 (1998).

II. Factual Context

I address at the outset USDA's motions to strike. In support of MCS's own motion for summary judgment and in opposition to that of USDA, it filed affidavits of its executive director, James Bauer. *See* Affidavit of James Bauer ("First Bauer Aff.") (Docket No. 15); Second Affidavit of

James Bauer ("Second Bauer Aff.") (Docket No. 22). USDA asks the court to strike both of these documents in their entirety on grounds that (i) the parties already litigated the issue of what constitutes the record for proper judicial review, which is limited to the administrative record as supplemented by discovery permitted by the court's order of May 14, 2001, and (ii) rather than citing to the official record, which should be the focal point of judicial review, MCS improperly relies on *post hoc* affidavits. Defendant's Opposing SMF at 1-2; Defendant's Reply SMF ¶ 43.

The first point is without merit. The court's order of May 14th did not purport to address the scope of the record for judicial review, but rather focused on the appropriateness of discovery – in particular, a request by MCS to depose USDA hearing officer Beverly King. *See* Memorandum Decision and Order on Cross-Motions To Amend Scheduling Order (Docket No. 11); Minutes of Oral Argument Held May 14, 2001 on Defendant's Motion To Reconsider Magistrate's Decision and Order. As to the second point, it is indeed true that the basis for review of an administrative decision is the administrative record. *See, e.g., Town of Norfolk v. United States Army Corps of Eng'rs*, 968 F.2d 1438, 1458 (1st Cir. 1992). However, there are exceptions justifying consideration of extra-record materials, including the existence of a strong showing of improper conduct. *Id*. at 1456; *see also Custer County Action Ass'n v. Garvey*, 256 F.3d 1024, 1027 n.1 (10th Cir. 2001) (listing, among justifications for looking outside confines of administrative record, "evidence coming into existence after the agency acted [that] demonstrates the actions were right or wrong").

To a considerable extent the affidavits merely provide Bauer's *post hoc* version of facts in existence at the time of creation of the administrative record, with no accompanying explanation or justification for the seeming incursion into the province of the underlying record. *See* First Bauer Aff. ¶¶ 3-10, 15; Second Bauer Aff. ¶¶ 3, 5.[1] As to these paragraphs, the motions to strike are granted.

[1] In its memoranda, MCS intimates that had it had the opportunity to rebut certain arguments made *ex parte* to the hearing officer, it (*continued on next page*)

However, both affidavits also address asserted procedural improprieties or other issues extrinsic to the underlying record. *See* First Bauer Aff. ¶¶ 11-14; Second Bauer Aff. ¶¶ 4, 6. As to these paragraphs, the motions to strike are denied.[2]

With this threshold issue resolved, the parties' statements of material facts, credited to the extent either admitted or supported by record citations in accordance with Loc. R. 56, reveal the following relevant to this recommended decision:

A. Plaintiff's Motion

MCS is a Maine corporation with a principal place of business in Gorham, Maine. Plaintiff's Statement of Facts in Support of Its Motion for Summary Judgment ("Plaintiff's SMF") ¶ 1; Defendant's Opposing SMF ¶ 1. At all times relevant to this action, MCS was approved by the Maine Department of Human Services ("DHS") to serve as a "sponsoring organization" under the Federal Child and Adult Care Food Program ("CACFP") run by USDA. *Id*. ¶ 2.

Commencing in early 1997 USDA's Office of Inspector General ("OIG") performed an audit of MCS's business that concluded, among other things, that MCS had overclaimed $353,865 of CACFP funds. *Id*. ¶ 5. On March 24, 1999 DHS wrote MCS, informing it that, on the basis of the OIG audit report, DHS had found MCS to be "seriously deficient." *Id*. ¶ 6. DHS required MCS to undertake certain "corrective actions," including refunding to DHS (which DHS then would refund to USDA) the $353,865 in alleged overclaim payments. *Id*.

On April 6, 1999 MCS appealed those "fiscal claims" to USDA pursuant to 42 U.S.C. § 1766(e), requesting a hearing. *Id*. ¶ 7. On August 30, 1999 USDA hearing officer Beverly King wrote to MCS, DHS, OIG and USDA, stating in pertinent part:

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would have presented some of these new facts. *See, e.g.*, Plaintiff's Reply Memorandum (Docket No. 24) at 5. However, the argument is not well-developed; MCS does not clarify which facts never were presented to the hearing officer or why.

[2] The motions to strike also are denied as to the remaining paragraphs, which simply lay a foundation for the facts asserted in the (*continued on next page*)

> This is to confirm the arrangements which have been made for the meeting to discuss the administrative appeal by Maine Care Services of the fiscal claim established against it by the Maine Department of Human Services. . . .
>
> As I have explained to all the parties involved this is an informal meeting. The purpose of the meeting is to give each of you the opportunity to present in person to me any information which you feel is pertinent to my review of this case. There are no formal discovery procedures or cross-examination of witnesses. The meeting is primarily for my benefit. . . .
>
> I have given consideration to the request by the Department of Human Resources to tape the meeting and I have decided that it is more important that this be an informal session. I believe that a taperecorder would create a certain level of discomfort. Therefore, it will be necessary for you to take notes if necessary to recall later what was said.

Id. ¶ 9.

The meeting with King was held on September 2, 1999 at USDA in Alexandria, Virginia. *Id.*¶ 10. MCS contends that it did not understand that meeting to be the official administrative hearing on its appeal. Plaintiff's SMF ¶ 10; First Bauer Aff. ¶ 11.[3] King presided over the meeting. Plaintiff's SMF ¶ 11; Defendant's Opposing SMF ¶ 11. However, because it was only an informal meeting of the interested parties, she conducted the meeting very informally. *Id*. Witnesses were not sworn in, and no transcript was made of the testimony. *Id*. That informal meeting was the only "hearing" afforded to MCS on its appeal. *Id*. ¶ 12.

After that informal meeting on September 2, 1999 but before King issued her decision in this matter on April 17, 2000 she corresponded with and received correspondence from DHS discussing the substantive issues on appeal. Plaintiff's SMF ¶ 13; Telephone Deposition of Beverly King ("King

affidavits. *See* First Bauer Aff. ¶¶ 1-2; Second Bauer Aff. ¶¶ 1-2.

[3] USDA denies this assertion, Defendant's Opposing SMF ¶ 10, arguing *inter alia* that MCS (i) was informed of the nature and extent of the process it would receive, *see, e.g*., Administrative Record ("AR") at 247-51, (ii) made a number of pre-hearing submissions to the hearing officer, *see, e.g*., Defendant's Statement of Material Facts with Respect to Which There Is No Genuine Issue ("Defendant's SMF") (Docket No. 18) ¶¶ 52, 55, 59-60; Plaintiff's Response to the Defendant's Statement of Facts ("Plaintiff's Opposing SMF") (Docket No. 23) ¶¶ 52, 55, 59-60; and (iii) sent its executive director and accountant to the meeting, *see, e.g*., Defendant's SMF ¶ 61; Plaintiff's Opposing SMF ¶ 61, all of which suggest that MCS understood the meeting to be its official hearing, Defendant's Opposing SMF ¶ 10.

Dep."), filed with Plaintiff's Motion, at 8-11; AR at 896, 900.[4] She both spoke with and received correspondence from Mary Ellen Cachelin of USDA concerning the substantive issues involved in MCS's appeal. Plaintiff's SMF ¶ 13; King Dep. at 11-14, 23-25; AR at 892. She received a memorandum from Robert J. Butzirus of OIG addressing a number of the substantive issues raised by MCS. Plaintiff's SMF ¶ 13; King Dep. at 25-27; AR at 868-78. And she had discussions with her supervisor (Mr. Heslin) and at least four other USDA employees (Chris Lipsey, Terry Hallberg, Rachel Bishop and Denise Londos) concerning substantive issues raised by MCS. Plaintiff's SMF ¶ 13; King Dep. at 15-23. According to MCS, she never advised it of any of these communications nor gave it an opportunity to rebut the information contained in them. Plaintiff's SMF ¶ 13; First Bauer Aff. ¶ 14.[5]

In addition, after holding her September 1999 meeting King drew up a list of "questions and issues of concern to me." Plaintiff's SMF ¶ 14; Defendant's Opposing SMF ¶ 14. It was those questions and issues, particularly issues of Bauer's salary deferment and appropriate compensation for rental charges, as to which she sought advice from other USDA officials. *Id*.[6]

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[4] USDA admits that most, if not all of the post-hearing contacts to which MCS was not a party related to the issues of MCS's rent, director's salary and overtime, although it contends that whether these contacts were "*ex parte*" or concerned "substantive" issues are legal conclusions. Defendant's Opposing SMF ¶ 13. Contacts touching on the issues of rent, salary and overtime accurately can be characterized as "substantive" in the context of this case.

[5] USDA denies that King never advised MCS of these contacts, asserting that King gave MCS notice that she might consult the Office of General Counsel, CACFP and financial experts for assistance in understanding some of the issues involved in MCS's administrative appeal. Defendant's Opposing SMF ¶ 13; AR at 794-95, 820. USDA also denies that King failed to give MCS an opportunity to rebut the information obtained inasmuch as the record indicates that King gave MCS the opportunity to address the same questions that she posed to DHS and OIG and, in any event, whether there was adequate opportunity for rebuttal is a legal conclusion. Defendant's Opposing SMF ¶ 13 (citing Defendant's SMF ¶¶ 93-94; Plaintiff's Opposing SMF ¶¶ 93-94). MCS's further statement that "[t]hese ex-parte communications clearly had an impact on [King's] decision," Plaintiff's SMF ¶ 14, is disregarded on the basis that it is neither admitted nor fairly supported by the citations given. However, USDA admits that the information conveyed by the contacts was before King as she was making her decision. Defendant's Opposing SMF ¶ 14.

[6] The following additional contentions by MCS are disregarded on the basis that they are neither admitted nor supported by the citations given (one of which, paragraph 15 of the first Bauer affidavit, is in any event stricken): "The OIG report did not find any fault in MCS paying Mr. Bauer this deferred salary in 1997 – presumably because that deferred salary was paid to him after the OIG study was completed, but before the OIG report was written. Consequently, whether it was appropriate for MCS to pay Mr. Bauer his deferred salary in 1997 was never an issue in this case, and MCS was surprised to see Ms. King conclude that it had to refund Mr. Bauer's 1993-1996 salary because she concluded it was not appropriate for MCS to have paid him that salary in 1997." Plaintiff's

(*continued on next page*)

B. Defendant's Motion[7]

CACFP provides funds to assist organizations that provide food service to children in non-residential settings. Defendant's SMF ¶ 1; Plaintiff's Opposing SMF ¶ 1. At the federal level, CACFP is administered by USDA's Food and Nutrition Service ("FNS"). *Id*. ¶ 2. At the state level, state agencies receive, review and approve applications from institutions, disburse federal money to approved institutions for their administrative and operating expenses, and conduct reviews of participating institutions to determine their compliance with program requirements. *Id*. ¶ 3.

Sponsoring organizations are responsible for the administration of the food program by "providers" – day-care homes or child-care centers. *Id*. ¶ 4. Sponsoring organizations oversee providers, training them, monitoring their performance, processing their claims for reimbursement and distributing federal money received from state agencies to them for meals served to eligible children. *Id*. State agencies either reimburse or provide advance payments to sponsoring organizations. Plaintiff's Opposing SMF ¶ 5; 7 C.F.R. §§ 226.6(b)(10), 226.10(a). Providers plan menus, purchase, prepare and provide food to children within their care, and submit claims to their sponsors for reimbursement. Defendant's SMF ¶ 6; Plaintiff's Opposing SMF ¶ 6.

The Northeast Regional Office ("NERO") of FNS oversees operation of CACFP within the state of Maine. *Id*. ¶ 7. DHS is the state agency that administers CACFP for the state of Maine. *Id*. ¶ 8. MCS, which formerly did business as Southern Maine Christian Day Care, is a CACFP sponsor. *Id*. ¶ 9. The standard agreement between MCS and DHS in effect for the period October 1, 1996

SMF ¶ 15. As pointed out by USDA, the OIG audit report did in fact note that, in 1997 (following OIG's discussion of the matter with MCS's director), MCS paid its director his accrued but unpaid salary for 1996 and prior years. Defendant's Opposing SMF ¶ 15; AR at 184. As further noted by USDA, the OIG did find fault with the 1997 payment, noting that (with respect to accrued salary for 1995 and prior years) it "occurred . . . too late to qualify . . . as allowable expenses for the IRS." *Id*.; *see also* AR at 807 (King notes from hearing, stating that "CPA Audit issued later shows he did pay himself but much later and no [sic] in accord. w/ req's").

[7] As part of its opposition to USDA's motion for summary judgment MCS incorporates by reference, as additional facts, its statement of material facts in support of its own motion for summary judgment. Plaintiff's Opposing SMF at 48.

through September 30, 1997 ("Agreement") provided, among other things, that "[p]ayments under this contract are subject to the Contractor's compliance with all items set forth in this contract and subject to the availability of funds." *Id*. ¶¶ 10-11. The Agreement provided that MCS was subject to audit, and that disputes arising out of federal audit would be governed by the procedures in 7 C.F.R. Part 226, which includes section 226.6(k) governing institutional appeal procedures. *Id*. ¶¶ 15-16.

By memorandum dated October 8, 1996 NERO informed state agencies that OIG would be conducting a nationwide audit of CACFP sponsors and asked those agencies to assist in selecting one of their sponsors to be the subject of the audit. *Id*. ¶ 29. By memorandum dated October 17, 1996 DHS proposed that MCS be the sponsor subject to audit in the state of Maine. Defendant's SMF ¶ 30; AR at 149. In performing its audit of MCS, OIG visited NERO in Boston, DHS's office in Augusta, Maine, MCS's headquarters in Gorham, Maine, and numerous providers within MCS's sponsorship. Defendant's SMF ¶ 31; Plaintiff's Opposing SMF ¶ 31. In January 1999 OIG issued its final (revised) audit report ("Audit Report") with respect to MCS. *Id*. ¶ 35.

In that report, OIG found that MCS failed to manage its operations in accordance with CACFP regulations. *Id*. ¶ 37.[8] OIG found that MCS failed to monitor provider performance or review provider claims for reimbursement adequately, as a result of which claims for reimbursement were honored notwithstanding the fact that they were not accurate or supported by required documentation. *Id*. ¶ 38. OIG also found that MCS violated CACFP rules and regulations by engaging in several related-party transactions: treating its director's salary inappropriately, paying its director unreasonable overtime and renting space from its director. *Id*. ¶ 39. More specifically, OIG found that although MCS paid its other staffers their salaries in the month in which those salaries were

[8] As a general matter, MCS admits that USDA accurately sets forth the Audit Report's findings and recommendations but disputes their accuracy. *See* Plaintiff's Opposing SMF ¶¶ 36-45. It is unnecessary for purposes of the instant decision to delve into the details of that underlying dispute.

earned, it did not pay its director his salary on the same basis. *Id*. ¶ 40. Instead, according to OIG, MCS inappropriately used the administrative funds that DHS had dispensed for payment of the director's salary to advance money to providers to create an incentive for them to do business with MCS. *Id*.

OIG was not able to determine exactly how MCS treated its director's salary for accounting and tax purposes because MCS did not adequately document its treatment of that salary and because the director declined to provide OIG with additional documentation, such as his personal tax returns, that might have shed some light on how MCS treated his salary. Defendant's SMF ¶ 41; AR at 181. Notwithstanding these impediments, OIG determined that all of the alternative ways that MCS might have treated its director's salary (as deferred compensation, a loan or a donation) did not meet CACFP requirements. Defendant's SMF ¶ 42; Plaintiff's Opposing SMF ¶ 42.

In addition, OIG found that MCS had not properly documented its director's overtime and that, in any event, that overtime was unreasonable and unallowable because MCS was not requiring other staffers to work comparable amounts of overtime and had failed to make an effort to alleviate the need for its director to work overtime by trying to hire additional staff. *Id*. ¶ 43. OIG also found that the amount of money MCS paid to rent space from its director exceeded the regulatory limits applicable to such related-party transactions. *Id*. ¶ 44.

Among other things, OIG recommended that USDA recover overpayments for unsupported and inaccurate claims, unallowable director's salary and overtime, and unallowable rent. *Id*. ¶ 45. By letter dated March 24, 1999 DHS provided MCS with a copy of the Audit Report, informed MCS that it was seriously deficient in its administration of CACFP and directed MCS to repay $353,865 worth of improper, unallowable claims. *Id*. ¶ 46.

By letter dated April 6, 1999 MCS informed the USDA Administrative Review Branch that it took "exception to each and every finding [in the Audit Report and did] not believe that Maine Care Services should be required to repay any of the $353,865 requested." *Id*. ¶ 47. MCS requested a "face to face hearing" on its CACFP administrative review request. *Id*. By letter dated June 18, 1999 FNS administrative review officer King informed MCS that the Administrative Review Branch had granted its request for administrative review of the decision that MCS be required to repay $353,865 (MCS's fiscal claim). *Id*. ¶ 51.

By memorandum dated August 30, 1999 King informed the participants that her review would be informal and that there would be no formal discovery or cross-examination of witnesses. *Id.*¶60.[9] On September 2, 1999 King conducted an informal meeting with respect to MCS's fiscal claims. *Id*. ¶ 61. Assistant Regional Inspector General for Audit Butzirus, MCS director Bauer and accountant Samuel Davidson, DHS employee Thomas Stevenson and attorney Peter Bickerman, and FNS NERO employee Cachelin were present. *Id*. There is no verbatim transcription or record of the hearing. *Id.* ¶ 62.

At the outset, King stated that she would accept additional information from the participants after the hearing so long as it was submitted promptly and explained that she might consult the Office of General Counsel and CACFP and financial experts for assistance in understanding some of the issues, but assured participants that the final decision would be hers alone. Defendant's SMF ¶ 63; AR at 794-95, 820.[10] During the informal hearing King heard from all of the participants, including

[9] MCS again claims – and USDA again denies – that it did not understand the meeting to be the official administrative hearing in its appeal. Plaintiff's Opposing SMF ¶ 60; Defendant's Reply SMF ¶ 60.

[10] USDA's further assertion that the CACFP and/or financial experts included Christopher Lipsey, Defendant's SMF ¶ 63, is disregarded inasmuch as it is neither admitted nor supported by the citations given, which mention Lipsey but do not explain who he is, *see* AR at 794-95, 820. MCS denies that King made many of the statements set forth in paragraph 63, stating that it does not recall that she did. Plaintiff's Opposing SMF ¶ 63; Second Bauer Aff. ¶ 4.

MCS. Defendant's SMF ¶ 64; Plaintiff's Opposing SMF ¶ 64. MCS did not object to the manner in which King conducted the hearing. *Id*. ¶ 71.

By memorandum dated September 30, 1999 addressed to King, Butzirus transmitted additional information about the meals that OIG found ineligible for reimbursement. *Id*. ¶ 76.[11] He also responded to arguments that MCS accountant Davidson made in a July 12, 1999 letter to King. *Id*. Among other things, Butzirus explained that any use of a director's salary to make advances to providers was not an allowable administrative cost. Defendant's SMF ¶ 77; AR at 868.[12] He also explained that MCS's audit reports did not support, but rather contradicted, its claim that it was short of cash, as did the fact that MCS had enough cash on hand to pay its director $266,555 in 1997. Defendant's SMF ¶ 78; Plaintiff's Opposing SMF ¶ 78.[13] Butzirus explained that the overtime that MCS paid its director was not allowable because it was an unreasonable related-party transaction in which MCS paid its director $57 an hour to do clerical work when there were indications that there was labor available to do the work at a lower rate, MCS made no effort to hire labor at that lower rate and there was no emergency necessitating use of the director. *Id*. ¶ 79.[14]

Shortly before February 2, 2000 King asked Christopher Lipsey for his assistance in understanding the issues of MCS's director's salary and overtime. Defendant's SMF ¶ 80; King Dep.

[11] MCS repeatedly objects to USDA's description of the content of post-hearing communications to King on the ground that inasmuch as the contacts were *ex parte*, the communications should be excluded from consideration. *See, e.g*., Plaintiff's Opposing SMF ¶¶ 81-82, 85-92, 95-97. This objection makes sense only in the context of a review of the merits, which I do not reach.

[12] Although MCS, in essence, denies that this assertion is supported by the citation given, Plaintiff's Opposing SMF ¶ 77, I find that it is.

[13] MCS denies that Butzirus's conclusion was correct, noting that the fact that MCS had sufficient cash on hand to pay its director in 1997 does not mean that it was not having cash-flow problems from 1994-96. Plaintiff's Opposing SMF ¶ 78.

[14] MCS denies that its director's overtime was unreasonable or that MCS failed to hire additional labor. Plaintiff's Opposing SMF ¶ 79; AR at 742-43, 747. Its further assertion that Bauer was not performing clerical work, Plaintiff's Opposing SMF ¶ 79, relies on a paragraph of the second Bauer affidavit that has been stricken.

at 16-17.[15] By e-mail dated February 2, 2000 Lipsey provided King with his analysis of those issues. Defendant's SMF ¶ 81; AR at 882-85.

After the September 2, 1999 informal hearing King had several additional questions that she wanted to ask MCS, the state and FNS about the financial guidance that DHS had provided MCS, when DHS became aware that MCS was deferring its director's salary, when DHS became aware that MCS's director owned the building MCS was renting, whether DHS advised MCS of the limits on the amount it could claim for rent and whether DHS approved the rent MCS paid. Defendant's SMF ¶ 84; Plaintiff's Opposing SMF ¶ 84. King asked these questions of NERO employee Cachelin. *Id*. ¶ 85. By e-mail dated March 13, 2000 Cachelin stated, among other things, that CACFP sponsors are required to submit to annual independent audits and that since as early as 1993 MCS's independent auditors had been noting deficiencies and reportable conditions that MCS failed to correct. Defendant's SMF ¶¶ 86, 88; AR at 892.[16]

With respect to the issue of rent, Cachelin explained that the rent was included in MCS's budget but that MCS did not disclose to DHS that its director owned the building. Defendant's SMF ¶ 89; AR at 893.[17] On the other hand, Cachelin noted that MCS continued to claim reimbursement for rent after its own independent auditors informed MCS that rent was not allowable. *Id*. With respect to the issue of the director's salary, Cachelin explained that DHS became aware that MCS was deferring that salary sometime after MCS's 1995 administrative review. Defendant's SMF ¶ 90; AR

[15] USDA's further assertions that King queried Lipsey "as she told the participants that she might" and that "Lipsey was considered to be an in-house expert on such matters," Defendant's SMF ¶ 80, are disregarded inasmuch as they are neither admitted nor supported by the citation given.

[16] MCS disputes Cachelin's underlying statement, asserting that it had corrected most of those conditions, Plaintiff's Opposing SMF ¶ 88; however, the record material cited indicates that while, as of December 23, 1996, a general ledger and double-entry system of accounting had been implemented, a number of other previously cited deficiencies remained, AR at 323.

[17] MCS disputes Cachelin's underlying statement that it did not disclose its director's ownership of the building to DHS. Plaintiff's Opposing SMF ¶ 89. It claims that, in a letter written December 29, 1995 DHS made clear it knew of the relationship and approved of the rent amount. AR at 899.

at 893.[18] Cachelin stated that MCS was aware that its treatment of its director's salary was a problem at least as early as December 29, 1995, when its independent auditor informed it so. Defendant's SMF ¶ 91; AR at 893.[19] By facsimile dated March 13, 2000 Cachelin forwarded to King copies of MCS's 1995 independent auditor's working papers that indicated that the independent auditor believed that MCS's rent and director's salary were problematic and indicating that the auditor had informed MCS so. Defendant's SMF ¶ 92; AR at 887-91.[20]

By almost identical letters dated March 16, 2000 King asked both DHS and MCS what financial management information DHS had provided MCS, when DHS first became aware that MCS was deferring its director's salary, whether DHS was aware that MCS was renting from its owner, whether DHS informed MCS of limitations on the amount of rent for which MCS could claim reimbursement in such a related-party transaction, and whether DHS approved the amount of rent for which MCS claimed reimbursement. Defendant's SMF ¶ 93; Plaintiff's Opposing SMF ¶ 93.

By letter dated March 27, 2000 MCS claimed, among other things, that DHS had not provided it with any financial management information with respect to the specific issues of accrued payroll and permissible overtime "other than to say, 'as long as you don't go over your budgeted amount it is okay,'" that DHS had known since 1992 that MCS was deferring its director's salary, that MCS had disclosed ownership of its rental property in its yearly audited financial statements and that DHS had approved MCS's rent as part of the contract process. *Id*. ¶ 94.

By letter to King dated March 28, 2000 DHS stated, among other things, that it became aware that MCS was not handling its director's salary properly during the 1995 audit of MCS and that it

[18] According to MCS, DHS was aware that MCS was deferring its director's salary since at least 1992. Plaintiff's Opposing SMF ¶ 90; AR at 898.

[19] MCS contends that its independent auditor did not inform it that deferral of its director's salary was a "problem" but only that it constituted a "related party transaction." Plaintiff's Opposing SMF ¶ 91; AR at 261.

[20] According to MCS, the independent auditor did not indicate that either the director's salary or the rent were "problematic" but only (*continued on next page*)

approved what it thought was a reasonable amount for rent as part of MCS's administrative budget without knowing the property was owned by the director. Defendant's SMF ¶ 95; AR at 900-02.[21]

At some point after the September 2, 1999 hearing and before April 17, 2000 King discussed the impact of relevant OMB circulars on the issues of MCS's rent and director's salary with Bishop in the Office of General Counsel, Hallberg, branch chief of the program analyses branch of the child-nutrition division, and staffer Londos. Defendant's SMF ¶ 96; Plaintiff's Opposing SMF ¶ 96. At times after the September 2, 1999 hearing and before April 17, 2000 King met with her supervisor to discuss the audit and to keep her supervisor informed of her work. *Id*. ¶ 97.

By letter dated April 17, 2000 King affirmed OIG's audit findings and recommendation that MCS be required to repay a total of $353,865. *Id*. ¶ 98. More specifically, King affirmed that MCS should be required to repay $19,366 worth of provider claims for the month of January 1997 that were not supported by required documentation; $232 for inaccurate claims for reimbursement for meals served on the day OIG made site visits to providers; $1,699 in provider overpayments for the month of December 1999 resulting from inadequate oversight on MCS's part; $266,555 worth of administrative funds intended to pay MCS's director's salary that the director donated to MCS, which did not use the funds for their intended purpose, in violation of CACFP regulations, generally accepted accounting principles and the Internal Revenue Service code; $37,772 worth of overtime claimed by MCS's director that was not approved in advance as required by regulation, not adequately documented and violated CACFP regulations because it was unreasonable to pay the director overtime to perform clerical tasks such as data-entry work; $27,447 in excessive rental costs for space owned by its

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that they constituted "related party transactions." Plaintiff's Opposing SMF ¶ 92; AR at 261.

[21] MCS protests that, generally, the information provided by DHS was false, Plaintiff's Opposing SMF ¶ 95; however, the citation given does not support that proposition.

director; and $794 in wages paid to employees who worked in its day-care center in December 1996. *Id*. ¶¶ 99-105.[22]

III. Analysis

MCS alleges in Count I of its complaint that USDA failed to afford it a formal adjudicatory hearing in accordance with 42 U.S.C. § 1766(e) and 5 U.S.C. § 554 *et seq*., Complaint for Judicial Review ("Complaint") (Docket No. 1) ¶¶ 19-24; in Count II, that USDA failed to provide it copies of King's letter to DHS or DHS's response, in violation of 42 U.S.C. § 1766(e) and 5 U.S.C. §§ 554(d) and 557(d)(1), *id*. ¶¶ 25-29; in Count III, that USDA violated its Fifth Amendment right to due process by failing to hold a formal hearing and engaging in *ex parte* communications, *id*. ¶ 30; and in Count IV, that USDA committed errors of law in exceeding the scope of review and arriving at conclusions that are erroneous as a matter of law, unsupported by substantial evidence and arbitrary and capricious, *id.* ¶¶ 31-34.

MCS seeks summary judgment as to its claims that (i) USDA failed to afford it a formal adjudicatory hearing as required by 42 U.S.C. § 1766(e) and/or 5 U.S.C. § 554 *et seq*. and/or Fifth Amendment due process; (ii) King engaged in *ex parte* communications in violation of 5 U.S.C. § 554(d) and/or 5 U.S.C. § 557(d)(1) and/or Fifth Amendment due process; and (iii) King's decision concerning MCS's director's salary exceeded the scope of review and/or was erroneous as a matter of law. Plaintiff's Motion at 1-2. USDA seeks summary judgment as to all counts against it. Defendant's Motion at 1.

For the reasons that follow, I recommend that USDA be granted, and MCS be denied, summary judgment on the question whether USDA impermissibly failed to afford MCS a formal adjudicatory hearing; that MCS be granted, and USDA be denied, summary judgment on the question whether USDA

[22] Although MCS disputes that King's findings were correct, Plaintiff's Opposing SMF ¶¶ 99-105, that dispute is not material to (*continued on next page*)

engaged in impermissible *ex parte* communications in violation of MCS's due-process rights; and that the decision of hearing officer King be vacated and remanded for further proceedings not inconsistent herewith. Accordingly, I do not reach the question whether the hearing officer's decision was supportable on the merits.[23]

A. Failure To Hold Formal Hearing

In Counts I and II and a portion of Count III of its complaint, MCS asserts that USDA failed to afford it a formal adjudicatory hearing as required either by the Administrative Procedure Act ("APA") or constitutional due process. Complaint ¶¶ 19-30; *see also* Plaintiff's Memorandum at 5-10. The parties expend considerable energy debating whether Congress did, or did not, intend USDA hearings arising from CACFP audits to be treated as formal hearings for purposes of the APA. *See, e.g.*, Plaintiff's Memorandum at 5-8; Defendant's Opposition at 1-5; Defendant's Motion at 1-10; Plaintiff's Objection to the Defendant's Motion for Summary Judgment ("Plaintiff's Opposition") (Docket No. 21) at 2-7. However, a simple alternative argument by USDA is dispositive: that in contracting with DHS to participate as a sponsor in CACFP, MCS agreed that any disputes over audits would be governed by a certain set of regulations that do not happen to provide the procedural protections to which MCS now claims entitlement. *See* Defendant's Motion at 19-20.

Specifically, MCS agreed that disputes arising out of federal audits would be governed by the procedures set forth in 7 C.F.R. Part 226, which include section 226.6(k) governing institutional

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resolution of the instant cross-motions.

[23] The parties also address a further "procedural" point – MCS's claim that, in upholding the disallowance of funds earmarked for MCS's director's salary, King exceeded the permissible scope of review. Plaintiff's Memorandum of Law in Support of Its Motion for Summary Judgment ("Plaintiff's Memorandum") (Docket No. 13) at 12-14; Defendant's Opposition to Plaintiff's Motion for Summary Judgment ("Defendant's Opposition") (Docket No. 20) at 9-11. MCS asserts that King based this portion of her decision on a fact not previously at issue in the case: that MCS, in King's view, impermissibly reimbursed its executive director in 1997 for compensation that the executive director had donated to the program. Plaintiff's Memorandum at 12-14. Even assuming *arguendo* that affirmance on the basis of a ground other than those cited by DHS/OIG would exceed the bounds of permissible review, MCS fails to adduce cognizable evidence of its central tenet: that the propriety of the 1997 payment was not an issue in the case. Accordingly, on this point summary judgment should be granted in favor of USDA and denied as to MCS.

appeal procedures. *See* Defendant's SMF ¶ 16; Plaintiff's Opposing SMF ¶ 16. Section 226.6(k) provides the following rights: "a fair and impartial hearing before an independent official at which [appellants] may be represented by legal counsel; decisions . . . rendered in a timely manner not to exceed 120 days from the date of the receipt of the request for review; . . . the right to either a review of the record with the right to file written information, or a hearing which [appellants] may attend in person; and adequate notice . . . of the place, date and procedures of the hearing."[24] It also spells out in detail the minimum procedures to which appellants are entitled. 7 C.F.R. § 226.6(k)(1)-(12).

In agreeing to be governed by these procedures as a condition of serving as a CACFP sponsor, MCS waived the right to argue that it is entitled to different or additional rights and procedures, whether as a matter of statutory or constitutional law. *See, e.g., Holmes v. United States*, 868 F. Supp. 1348, 1355 (M.D. Ala. 1994), *aff'd*, 67 F.3d 314 (11th Cir. 1995) ("[A]n individual may contractually waive his constitutional right to Due Process. . . . Here, the plaintiff was under no compulsion or impetus to participate in the food stamp program. However, when he did so, he accepted the terms and conditions that accompanied the program[.]").[25]

Even were this not the case, USDA alternatively contends, and I agree, that MCS waived any objection to the use of an informal hearing procedure by failing to raise such an objection below. Defendant's Motion at 1-2 n.1; *see also Pepperell Assocs. v. EPA*, 246 F.3d 15, 27 (1st Cir. 2001) (Pepperell's argument that it lacked notice not raised in timely fashion before agency and so not before court on review).

[24] The right and procedures provided in the current version of section 226.6(k) are identical to those set forth in the version effective January 1, 1998, reprinted at pages 378 (back) to 379 (back) of the Administrative Record.

[25] MCS suggests that its agreement to be governed by section 226.6(k) does not obviate the question whether Congress intended such hearings to be formal. Plaintiff's Opposition at 5. I disagree. Section 226.6(k) provides detailed minimum procedural protections. Regardless of Congress's intentions, MCS expressly agreed that these particular procedures would govern its disputes arising from federal CACFP audits.

MCS rejoins that waiver is a voluntary and knowing relinquishment of a right, explaining that it interposed no objection to the procedures employed in connection with the September 2, 1999 meeting because it believed that meeting to have been only an informal pre-hearing conference. Plaintiff's Opposition at 5-6. However, failure to raise an issue in an administrative setting is deemed a waiver absent exceptional circumstances. *See, e.g., Massachusetts Dep't of Public Welfare v. Secretary of Agric.*, 984 F.2d 514, 524 (1st Cir. 1993) ("To be sure, there are exceptional circumstances under which a court might dispense with the raise-or-waive rule in the administrative law context. As a general matter, however, courts will not entertain an issue that the parties failed to raise in the proper administrative venue unless the issue is jurisdictional in nature or some other compelling reason exists.") (citations omitted).

MCS's subjective belief that the September 2, 1999 meeting was simply a pre-hearing conference is not an exceptional circumstance, particularly in view of the absence of evidence that MCS so much as even inquired about the scheduling of a formal hearing during the seven-and-a-half months that elapsed between the meeting and the issuance of the King decision.

For these reasons, summary judgment should be granted to USDA, and denied to MCS, as to the entirety of Counts I and II of the Complaint as well as that portion of Count III asserting that, as a matter of constitutional due process, MCS was entitled to a formal adjudicatory hearing.

B. *Ex Parte* Communications

While I conclude that MCS was not entitled to the formal-hearing protections of the APA (which include certain categorical bans on *ex parte* communications, *see, e.g.*, 5 U.S.C. § 557(d)(1)), the question remains whether certain communications in this case violated MCS's constitutional due-process rights.

MCS argues that "King admittedly engaged in ex-parte communications with Richard Jones, of DHS, and with several USDA employees," Plaintiff's Memorandum at 8-9, and that these contacts sufficiently undermined the integrity of the process and fairness of the result to necessitate vacation of King's decision and remand for further proceedings, *id*. at 10-12. USDA contends that the contacts in issue, nearly all of which were interagency, cannot be characterized as impermissible *ex parte* communications and, even if they could be, MCS falls short of demonstrating the appropriateness of vacatur on these facts. Defendant's Motion at 21-26.

Between September 2, 1999 (when King met with interested parties) and April 17, 2000 (when she rendered her decision) she had several contacts with other persons in which MCS was not included or the contents of which were not shared with MCS. These included (i) a September 30, 1999 memorandum from Butzirus to King responding to points made by MCS's accountant, Davidson, (ii) a February 2, 2000 e-mail from Lipsey to King responding to questions she had posed regarding MCS's director's salary and overtime, (ii) a March 13, 2000 e-mail from Cachelin to King responding to questions posed by King regarding DHS's interactions with MCS, (iii) a March 27, 2000 letter from DHS to King responding to questions King had posed separately to MCS and DHS in nearly identical letters, (iv) a discussion between King and other USDA personnel (Bishop from the Office of General Counsel, Hallberg, branch chief of the program analyses branch of the child-nutrition division, and staffer Londos) concerning MCS's rent and director's salary, and (v) periodic discussions with her supervisor, Heslin, to keep him informed of her work.

USDA first posits that King's contacts with her supervisor and colleagues were not by definition *ex parte* contacts. *Id*. at 21-22.[26] It asserts that (i) one subunit of USDA (the Administrative Review Branch) was reviewing audit findings made by another (OIG) with the aid of a third (FNS),

(ii) the process was informal and the participants "were not formal adversaries," and (iii) King's consultations with her supervisor and in-house experts such as Bishop, Hallberg, Londos and Lipsey were "internal consultations on technical issues, more akin to a judge conferring with her colleagues and law clerks about legal issues than to a judge discussing the facts of a case before her with one of the parties." *Id*. at 22-23.

There is authority for the proposition that, in the course of an agency adjudication, a decisionmaker may consult behind the scenes with agency staff without running afoul of a party's right to constitutional due process. *See, e.g., RSR Corp. v. FTC*, 656 F.2d 718, 724 (D.C. Cir. 1981) (noting that, in previous holdings that "off-the-record communications between members of the agency and interested outside parties violated the due process right of parties not privy to the communications . . . neither of these cases involve[d] improper influence of staff on agency decisionmakers, nor [did] the reasoning of either case lead us to apply the ban on ex parte contacts to agency staff.") (footnotes and internal quotation marks omitted); *New England Tel. & Tel. Co. v. Public Utils. Comm'n*, 448 A.2d 272, 279 (Me. 1982) (due process does not prohibit agency decisionmakers from being "properly aided by reports of subordinates").

However, in this case, the conclusion is inescapable that two of the USDA "subunits," OIG and NERO, were in substance "interested parties" whose interests clearly were adverse to those of MCS. NERO, which oversaw the administration of CACFP in Maine, had worked with DHS to target MCS for audit, and OIG had conducted that audit. Tellingly, both OIG and NERO sent representatives (Butzirus and Cachelin) to the September 2, 1999 meeting with King. Not surprisingly, Butzirus's post-hearing memorandum to King took issue with Davidson's arguments and defended the findings of OIG, while Cachelin's post-hearing e-mail not only answered King's questions concerning when DHS

[26] As MCS points out, Plaintiff's Opposition at 9, USDA does not even attempt to argue that King's post-hearing contact with DHS (*continued on next page*)

became aware of certain problems but also offered that MCS itself had known of these problems, with Cachelin faxing documentation to King in support of the latter contention.

In circumstances such as these, the mere fact that King, Butzirus and Cachelin worked for the same agency does not shield USDA. *See, e.g., Greene v. Babbitt*, 943 F. Supp. 1278, 1286 (W.D. Wash. 1996) ("The government attorney, Scott Keep, was the Department of Interior's representative and counsel, and he argued and defended the Department's position in the proceedings before the Administrative Law Judge. As an advocate, he was prohibited from participating in, advising, or assisting the Assistant Secretary [of the Interior] with her final decision as to tribal recognition for the Samish. Nevertheless, Mr. Keep, . . . with apparent disregard for both statutory and traditional standards of fair play, met directly with the ultimate decision maker and urged her to deny federal recognition to the Samish.").

Notwithstanding MCS's arguments to the contrary, *see* Plaintiff's Opposition at 8-9, the same cannot be said of King's post-hearing contacts with the remaining USDA personnel (Lipsey, Bishop, Hallberg, Londos and Heslin). There is no evidence that any of these employees was aligned with OIG or NERO, harbored any advocacy interest in MCS's appeal or functioned in any manner other than as characterized by USDA – as a technical/legal adviser (in the case of Lipsey, Bishop, Hallberg and Londos) and as King's supervisor (in the case of Heslin).

The question remains whether, in view of King's *ex parte* communications with Butzirus of OIG, Cachelin of NERO and DHS, vacatur is warranted. "The ultimate question in determining if a proceeding in which *ex parte* communications occurred must be vacated [on due-process grounds] is whether the integrity of the process and the fairness of the result were irrevocably tainted by the

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was not an *ex parte* communication.

communications." *Springfield Terminal Ry. Co. v. United Transp. Union*, 767 F. Supp. 333, 349 (D. Me. 1991).

A number of considerations may be relevant to this determination: "the gravity of the ex parte communications; whether the contacts may have influenced the agency's ultimate decision; whether the party making the improper contacts benefited from the agency's ultimate decision; whether the contents of the communications were unknown to opposing parties, who therefore had no opportunity to respond; and whether vacation of the agency's decision and remand for new proceedings would serve a useful purpose." *PATCO v. Federal Labor Relations Auth.*, 685 F.2d 547, 564-65 (D.C. Cir. 1982) (footnotes omitted). However, these factors are not to be applied woodenly: "Since the principal concerns of the court are the integrity of the process and the fairness of the result, mechanical rules have little place in a judicial decision whether to vacate a voidable agency proceeding. Instead, any such decision must of necessity be an exercise of equitable discretion." *Id*. at 565.

As USDA sees it, (i) the contacts at issue were neither grave nor unknown to MCS, inasmuch as King informed participants at the hearing that she would accept additional information from them and might consult the Office of General Counsel and CACFP and financial experts for assistance in understanding some of the issues, (ii) the people who contacted King did not benefit from her decision but "were just government employees involved in administering the Program," (iii) although King considered the information she obtained via the contacts, all but the DHS contact were communications with USDA employees, mostly addressing technical issues, (iv) King gave MCS an opportunity to address the same questions to which DHS and Cachelin responded, (v) MCS identifies no argument it was prevented from making, and (vi) remand would serve no useful purpose inasmuch as MCS generates no material disputes as to the facts underpinning the King decision. Defendant's Motion at 24-26. Moreover, in USDA's view, MCS "was not prejudiced by the contacts because no

one presented Ms. King with any new evidence or made any new argument" and MCS identifies no new argument or facts it would present on remand that King did not already have the opportunity to consider or that might make a difference to the outcome. Defendant's Opposition at 8-9.

MCS rejoins that (i) the *ex parte* contacts "obviously had a significant effect" on King's decision, (ii) although it admittedly was not "prevented" from making arguments inasmuch as it did not even know about the communications, had it known about them it would have made a number of additional arguments, and (iii) disputes remain as to the underlying facts. Plaintiff's Opposition at 8-11.

For the following reasons, the equities in this case weigh in favor of MCS:

1. The contacts were of a grave nature; they concerned the key issues in the case, including the deferral of payment of the executive director's salary and the allegedly unreasonable payment of overtime. *Compare, e.g., Springfield Terminal*, 767 F. Supp. at 349 ("*[E]x parte* communications aimed at acceleration of a case or scheduling in general are viewed as less serious intrusions and require a stronger showing of prejudice before a proceeding or award may be voided.").

2. While MCS may overstate its case in claiming that the contacts "obviously had a significant effect" on King's decision, I find that they likely did influence it. King reached out for help both in ascertaining certain facts (such as what DHS knew and when) and in comprehending the complex technical/legal issues at stake. As USDA admits, Defendant's Motion at 24, she took the responses of DHS, OIG and NERO into consideration in formulating her decision.

3. Although USDA argues, and I have no reason to doubt, that the individuals with whom King had contact (who were "just government employees") did not benefit from King's decision, this

misses the point. King's decision was favorable on all fronts to the agencies these individuals represented.

4. At no point prior to the issuance of King's decision on April 17, 2000 did USDA make the contents of any of the communications in question available to MCS, depriving it of the opportunity to respond. That King posed the same questions to MCS as it did to DHS and NERO did not compensate for that loss. *See, e.g., Morgan v. United States*, 304 U.S. 1, 18 (1938) ("The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one.").

5. USDA contends that MCS fails to identify any prejudice caused by the *ex parte* contacts in issue or to demonstrate that vacatur would serve any useful purpose. As an initial matter, I note that MCS does contest many of the underlying representations made in the *ex parte* communications in issue. While MCS in so doing relies primarily on materials and arguments already of record, MCS was at a minimum denied the opportunity to marshal that data in a pointed response to the *ex parte* communications. In any event, there are some cases in which "the procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process." *AT&T Communications of the Southwest, Inc. v. Southwestern Bell Tel. Co*., 86 F. Supp.2d 932, 953 (W.D. Mo. 1999), *rev'd in part on other grounds sub nom. Southwestern Bell Tel. Co. v. Missouri Pub. Serv. Comm'n,* 236 F.3d 922 (8th Cir. 2001) (citation and internal quotation marks omitted); *see also Shidaker v. Carlin*, 782 F.2d 746, 751 (7th Cir. 1986), *vacated on other grounds sub nom. Tisch v. Shidaker*, 481 U.S. 1001 (1987) ("If the procedure is found substantially defective because likely to prejudice the rights of individuals subjected to that procedure, the substantive merits of Shidaker's particular retaliation claim are irrelevant. We are thus unconcerned

with whether, absent the *ex parte* communication from Santoro to Koenigs, Koenigs would have reached the same decision to demote Shidaker.") (citations omitted). In my view, given the gravity of the contacts at issue, the lack of any opportunity for a pointed response and the likelihood that these contacts influenced King's decision, this is such a case.

I accordingly recommend that summary judgment be granted as to MCS and denied as to USDA with respect to that portion of Count III of the Complaint alleging that by virtue of USDA's *ex parte* contacts MCS was denied constitutional due process.

IV. Conclusion

For the foregoing reasons, I **GRANT** in part and **DENY** in part USDA's motions to strike the Bauer affidavits and recommend that the court (i) **GRANT** the Defendant's Motion and **DENY** the Plaintiff's Motion as to Counts I and II of the Complaint, as well as that portion of Count III alleging violation of constitutional due process as a result of failure to afford MCS a formal adjudicatory hearing; (ii) **GRANT** the Plaintiff's Motion and **DENY** the Defendant's Motion as to that portion of Count III of the Complaint alleging violation of constitutional due process as a result of *ex parte* communications; (iii) **GRANT** the Defendant's Motion and **DENY** the Plaintiff's Motion as to that portion of Count IV alleging that the decision of the hearing officer exceeded the scope of permissible review; and (iv) **VACATE** the decision of hearing officer King and **REMAND** the case for further proceedings not inconsistent herewith before a new USDA hearing officer.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 9th day of November, 2001.

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David M. Cohen
United States Magistrate Judge